

From: Mohamed Rali Badissy, Party, Case # 18544

Date: 05/20

Re: Final Submission re Off-Street Parking Variance

Summary

The Applicant in Case # 18544 has requested a variance from the off-street parking requirements under DC's Zoning Regulations that would reduce the amount of parking that it is required to provide by over 25%. This variance request should be denied because Applicant has failed to satisfy its burden of providing sufficient evidence to overcome the uniqueness and practical difficulties standards established by BZA precedent. In the alternative, if the BZA does wish to grant the variance, it should only do so in return for the Applicant withholding RPP rights from future tenants to ensure that the burden of the reduction in off-street parking is not borne by the surrounding neighborhood.

The Burden Upon the Applicant

It is well recognized that in order to be granted an area variance, an applicant has the burden of providing sufficient evidence to the BZA that "(1) there is an extraordinary or exceptional condition affecting the property; (2) practical difficulties will occur if the zoning regulations are strictly enforced; and (3) the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan" *Washington Canoe Club v. District of Columbia Zoning Com'n*, 889 A.2d 995, 1000 (D.C. 2005); see also *The Oakland Condominium v. District of Columbia Bd. of Zoning Adjustment*, 22 A.3d 748, 752 (D.C. 2011).

For sake of fairness, I will concede that the Applicant has satisfied the third element of the variance test, detriment to the public good. Both the Applicant's submission and those of DDOT and the Office of Planning indicate that there is sufficient parking in the area surrounding the proposed building to absorb additional on-street parking. As a matter of policy, I would argue that myself and the other residents in the area see this abundance of parking as a key feature of our neighborhood, and our property value, but as a matter of law I admit that the Applicant has provided sufficient evidence upon which the BZA could conclude that the variance could be granted without "substantial detriment to the public good".

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The remainder of this brief will focus on the first two elements of the variance test, uniqueness and practical difficulty, since these are the two elements where Applicant has failed to produce sufficient evidence to the BZA.

Uniqueness

The following is a detailed summary of the uniqueness test from *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990) (citations omitted for brevity):

[T]he rationale behind the uniqueness test is that difficulties that are common to or affect an entire neighborhood, or a substantial portion thereof, are properly addressed by seeking amendment of the regulations themselves from the Zoning Commission . . . If such problems were addressed through individual variances, the effect would be a de facto amendment of the zoning regulations by BZA because requests by other owners similarly situated would have to be granted as a matter of equal protection under the due process clause. It is the Zoning Commission, however, not BZA that is empowered to make such amendments to the overall zone plan.

The test follows from its rationale. To support a variance it is fundamental "that the difficulties or hardships [be] due to unique circumstances peculiar to the applicant's property and not to the general conditions in the neighborhood." There is no requirement that the uniqueness "inheres in the land at issue" The statute does not preclude the approval of a variance where the uniqueness arises from a confluence of factors. The critical point is that the extraordinary or exceptional condition must affect a single property.

Applicant makes two arguments in regards to the unique nature of this property that should lead to a parking variance: 1) that a second cellar subfloor would be cost prohibitive and 2) that use of additional space in the currently planned subfloor for parking would be inefficient. Applicant has failed to provide any evidence, in the form of survey data, cost estimates or expert testimony, for either of these arguments. To the contrary, both in its pre-hearing brief and through the testimony of its architect at the first evidentiary hearing, Applicant readily admits that dedication of additional space in the cellar to parking *is possible*.

Again, for the sake of time, I will skip Applicant's first point in regards to building a second cellar/subfloor. Let us focus on the Applicant's "efficiency" argument. In effect, Applicant is arguing that use of the eastern portion of the property for additional parking

would be “inefficient” because parking spaces would have to be laid out in a non-linear manner, unlike the western portion of the cellar where parking can easily be laid out in two rows. While the narrowness of the eastern portion of the cellar is indeed unique to the property, there is nothing about this property trait that prohibits Applicant from providing additional parking. Really, all that the Applicant’s arguments amount to, unsubstantiated as they are, is that Applicant will not be able to put *as much* parking in the eastern portion of the cellar as in the western portion. This is not a unique circumstance of the property as a whole but rather a difference in layout between the western and eastern portions of the cellar. In other words, Applicant has failed to show a unique circumstance of the property that prevents it from providing additional parking but has instead merely shown a difference in character across the two sides of the cellar that will not let it put as much parking on one side as it has on the other.

It is worth noting here that inherent in Applicant’s efficiency argument, an argument which has never been recognized as the sole basis for a variance in prior BZA cases, is the idea that the area in the eastern portion of the cellar could be put to better use as residential units since future residents are unlikely to require a significant amount of parking due to the habits of the young professionals that Applicant is seeking to attract as tenants. Applicant made this argument explicitly during the first evidentiary hearing. This argument is precisely the kind of indirect amendment of the zoning regulations that the DC Courts rejected in *Gilmartin*. If the BZA were to grant the requested parking variance on the basis that residential units are a more “efficient” use of space than parking spaces then it would in effect exempt any future developer in the area from providing code-defined off-street parking as long as they too assert an intent to attract public-transit using tenants.

Practical Difficulties

The same case cited for the uniqueness test above *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, also provides a useful summary of the practical difficulties test:

In order to prove that an applicant suffers from 'practical difficulties' two elements must be proven: The applicant must demonstrate that (1) compliance with the area restriction would be unnecessarily burdensome; and (2) the practical difficulties are unique to the particular property . . . Economic use of property has been considered as a factor in deciding the question of what constitutes an unnecessary burden or practical difficulty in variance cases." *Gilmartin*, supra, 579 A.2d at 1170 (quotations and citations omitted).

Here, again, Applicant has failed to satisfy its evidentiary burden of showing that providing the code-defined amount of off-street parking would result in a practical

difficulty. Applicant suggests in both its pre-hearing brief and the testimony of its architect at the first evidentiary hearing that dedicating additional space in the eastern portion of the cellar would require relocation of the elevator and adjustment of certain features such as stairs between the cellar and the first floor. However, Applicant has failed to produce any drawings to illustrate what these changes would look like or how they would impact the development plan for the property. Applicant has also failed to produce any economic data as to what the cost of these changes would be. In the absence of this information, it is equally reasonable for the BZA to determine that developing the eastern portion of the cellar as additional parking would be *cheaper* than building residential units into that space and would improve the economics of the project overall (Applicant conveniently ignores the fact that parking spaces are also a revenue generating feature under their business plan).

Applicant also fails to provide evidence that there is a practical difficulty with economic use of the property. It is important to again point out that, by the Applicant's own admission, building out additional parking space into the eastern portion of the cellar *is possible*. At the core of the Applicant's efficiency argument is the implication that it would be more economical, i.e. profitable, to use this space for residential units since parking is not as important to likely future tenants. The fact that the most likely tenants in studio and one-bedroom units in the Capitol Hill area are more likely to use public transportation than own a car is not a unique feature of the property but a general feature *of the neighborhood*. Again, granting the variance on this basis would provide a dangerous precedent to all future developers seeking to build multi-unit residential properties in Capitol Hill.

Give and Take

As outlined above, Applicant has utterly failed to satisfy their evidentiary burden in regards to both the uniqueness and practical difficulties test as laid out in *Gilmartin*. At most, Applicant has raised possible justifications for the off-street parking variance without providing any visual, data or economic evidence for the BZA to evaluate the merit of those justifications. If the BZA were to take the extraordinary step of granting a variance in this circumstances, it should also take the considerably less extraordinary step of requiring the Applicant to withhold Residential Parking Permit (RPP) rights from future tenants.

Applicant has based much of its off-street parking variance argument on the assumption that future tenants are more likely to use public transportation, cycling or shared-use vehicles as a means of transportation than a personal automobile. Taking this argument to its logical extension suggests that RPP rights are unnecessary since the small amount of

tenants who do own cars will simply rent parking from the building. Thus, withholding RPP rights is consistent with the Applicant's development plan. Moreover, it is the most effective tool that the BZA has to ensure that the granting of a parking variance will not have the unexpected consequence of forcing the surrounding neighborhood to absorb the cost of tenants who are not able (or willing) to rent parking spaces within the building. If the BZA does decide to grant the variance, doing so on the basis of a withholding of RPP rights is the fairest solution for everyone.

Closing

In closing, I would urge the BZA to reach the following conclusion:

1. Applicant has failed to satisfy their evidentiary burden in showing that unique characteristics of the property prevent the provision of the amount of off-street parking required by DC's Zoning Code.
2. Applicant has failed to show that, even if there is a unique characteristic of the property that prevents additional parking, overcoming any challenges inherent in the developing sufficient parking on the property would result in a practical difficult.

In the alternative, if the BZA is inclined to grant the off-street parking variance, I would urge that it do so only if the Applicant is willing to withhold RPP rights from future tenants.

Thank you for your consideration of these arguments and for providing me with the opportunity to be heard in this case. The professionalism of the BZA and its outstanding staff, including Mr. Moy, has provided me with a refreshingly optimistic impression of our government and has made me more proud than ever to be a citizen of the district.

Mohamed Rali Badissy